SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 439

LOUIS LEVINSON AND MITCHELL A. HALL,
Petitioners,

vs.

WILLIAM DEUPREE, JR., ANCILLARY ADMINISTRATOR OF THE ESTATE OF KATHERINE WING, DECEASED,
Respondent

SUPPLEMENTAL BRIEF OF RESPONDENT

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At the conclusion of oral argument in this case the Chief Justice asked counsel for petitioners whether petitioners had not waived the right to object to respondent's capacity as Kenton County administrator by filing answers to the original libel before demurring; he also asked what counsel had to say about *Ebner et al.* v. *Official Board of Methodist Episcopal Church of Pineville*, 214 Ky. 79, 282 S.W. 785 (1926). This brief is filed in answer to Supplemental Memorandum Brief of Petitioners which they have filed in response to these questions.

For the purpose of this brief it will be assumed that respondent's appointment in Kenton County was irregular and that Kentucky law is controlling with respect to plead-

ing, neither of which assumptions is conceded to be true by respondent.

It must be pointed out, also, as a preliminary matter that petitioners' claim of the invalidity of the Kenton County appointment is founded on the claim that respondent's affidavit for leave to sue *in forma pauperis* stated that "decedent was possessed of no estate" (Petitioners' Supplemental Memorandum, p. 4). What the affidavit actually said (R. 9) was that "decedent was possessed of no estate *out of which costs or expenses herein can be paid or from which security therefor can be given*"—a very different statement, which did not show the lack of any assets either at the time of death or at the time the affidavit was made, over a year later. Thus the District Court's language (quoted on p. 5 of Petitioners' Supplemental Memorandum) that the affidavit set forth "the fact that the decedent had no property in this state at the time of her death" is erroneous.

At the outset it should be observed that the Kenton County Court's action is presumed to be proper until the contrary is affirmatively shown. If the jurisdiction of a county court be collaterally attacked, the burden is on the party raising the issue to show lack of jurisdiction. *Jacob's Adm'r* v. *Louisville and Nashville Railroad Company*, 73 Ky. 263 (1874). *Bartlett* v. *Buckner's Adm'r*, 265 Ky. 747, 97 S.W. (2d) 805, 809 (1936). When a county court has appointed an administrator, the presumption is in favor of the jurisdiction of the court to make the appointment even though the intestate was a resident of another state. *Brents* v. *Vittatoe's Adm'r*, 8 Ky. Law Rep. 427 (1886).

Furthermore, even if an administrator's appointment is defective, his acts performed while the appointment is in effect can be valid and binding. In *Taylor* v. *Tibbatts*, 52 Ky. 177, the Kentucky Court of Appeals called an admin-

istrator's appointment "void" and "a perfect nullity" (where a will was later probated and an executor appointed). "But," added the court (p. 184), "the acts of such an administrator, before probate of the will, may be valid, so far as the rights of strangers are affected by them."

Thus the Kentucky court in effect holds that a defectively appointed administrator is an administrator *de facto* whose acts possess legal validity. An appointee not entitled to be an administrator according to statute can sue for wrongful death and bind the estate until the order of appointment is reversed. *Buckner's Adm'r v. Louisville and N. R. Co.*, 120 Ky. 600, 87 S.W. 777 (1905). In *McFarland's Adm'r v. Louisville and N. R. Co.*, 130 Ky. 172, 113 S.W. 82 (1908), a woman was appointed administratrix upon her false representation that she was the widow of the decedent, whereupon she settled a death claim with the defendant railroad. The court held that under the usual rule and the Kentucky statute the woman's acts performed during her appointment were valid, and the settlement barred action by an administrator who was later properly appointed. In *Louisville and N. R. Co. v. Bays' Adm'x*, 220 Ky. 458, 295 S.W. 452 (1927), the defendant claimed the appointment of plaintiff as administrator was void because made by a judge pro tem. who was without authority to act. The court, however, held that the judge had "color of title to this office, he was at least a *de facto* judge pro tem. of the Harlan County court, and the acts of *de facto* officers are valid as to third parties. They cannot be attacked collaterally."

The statute above referred to is Kentucky Revised Statutes, Section 395.330, which reads as follows:

"*Acts prior to revocation of powers valid.*

"Where an order of administration is set aside or letters of administration revoked, or where any execu-

> tor or administrator is removed, or the will under which he acted is declared invalid, all previous sales of personal estate made lawfully by the executor or administrator and with good faith on the part of the purchaser and all other lawful acts done by the executor or administrator, shall remain valid and effectual."

Louisville & N. R. Co. v. *Turner*, 290 Ky. 602, 162 S.W. (2d) 219 (1942), discussed on page 13 of respondent's original brief, is a recent application of the rule that the acts of a defectively appointed administrator are valid.

Turning now directly to the question of the efficacy of petitioners' special demurrers, filed after they had filed answers consisting of general denials, one observes that, under Kentucky law, there are two permissible methods of raising the issue of a plaintiff's capacity. The first method is by special demurrer. Kentucky Civil Code of Practice, Section 92. A special demurrer under this section, however, can only be sustained if the defect complained of appears on the face of the pleading. *Webb* v. *Kersey*, 255 Ky. 217, 73 S.W. (2d) 4 (1934). Petitioners (Supplemental Memorandum, p. 3) quote additional authority to this effect and concede (p. 4) that they could not have filed special demurrers to respondent's original libel because no demurrable defect appeared upon its face. They contend that they could demur only after respondent's affidavit for leave to sue *in forma pauperis* was filed. However, even if that affidavit could be construed as showing a lack of proper appointment of respondent, it did not change the rule that a special demurrer lies only to a pleading which shows a ground therefor "*on its face.*" *Webb* v. *Kersey*, *supra*. Respondent's proper remedy for the supposed defect was the second statutory method provided for attacking capacity to sue: by answer pursuant to Kentucky Civil Code of Practice, Sec. 118, which reads as follows:

> "*Special demurrer may be presented by pleading; waiver.* A party may, by an answer or other proper pleading, make any of the objections mentioned in Section 92, the existence of which is not shown by the pleading of his adversary; and failure so to do is a waiver of any of said objections, except that to the jurisdiction of the court of the subject of the action."

The statute contemplates that such an answer contain an affirmative plea relative to incapacity, not simply a general denial. In *Louisville & N. R. Co.* v. *Herndon's Adm'r*, 126 Ky. 589, 104 S. W. 732, 735 (1907), where the defendant claimed that the plaintiff had no authority to act as administrator, the court said:

> "The petition alleged that it qualified as such administrator, and the presumption of law is that the court required it to duly qualify, unless there was something in the order which negatived that fact. We are of opinion that the allegations of the petition show a prima facie right in appellee to prosecute this action. Appellant did not controvert, in its answer, these allegations, nor allege any fact showing its incapacity to maintain this action. It has contented itself by filing a general demurrer to the petition, which, in our opinion, was not the proper method to reach the question. Section 92, Civ. Code prac. provides: 'A special demurrer is an objection to a pleading which shows, first that the court has no jurisdiction of the defendant or of the subject of the action; or, second, that the plaintiff has not legal capacity to sue. * * *. Either of said grounds of objection, shown to exist by a pleading, is waived, unless distinctly specified by a demurrer thereto, except the objection to the jurisdiction of the court of the subject of the action, which objection is not waived by failing to make it.' Appellant, having failed to file this special demurrer, and also having failed to make a plea in its answer showing the incapacity of appellee to maintain this action, waived

its right to now present this question. See the case of Warfield v. Gardner's Adm'r, 79 Ky. 583."

The *Ebner* case, which followed and applied the case just quoted from, held, on a claim of no capacity to sue, that, "by section 92, subsec. 2, of the Code, the objection that the plaintiff has not legal capacity to sue must be made by a special demurrer. No special demurrer was filed. The general demurrer was a waiver of this objection under subsection 4 of section 92."

Again in *Wedding* v. *First National Bank of Chicago*, 280 Ky. 610, 133 S. W. (2d) 931, 933 (1939), the Kentucky Court of Appeals held that an alleged defect in the petition with respect to plaintiff's capacity was waived by the filing of a general demurrer. Such defect "could only be attacked by a special demurrer or by a pleading under section 118 of the Civil Code of Practice, and appellant filed no special demurrer, nor any plea under section 118."

In short, where there are grounds for a special demurrer, "the question must be raised in some proper way (i.e., by special demurrer), where the facts appear on the *face* of the petition, or by *answer in the nature of a plea in abatement*, where such facts do not appear. Civil Code §§92 and 118 . . . In the present case the question was not raised by special demurrer or by answer by way of plea in abatement. On the contrary, both defendants answered to the merits without saving the question. That being true, the defense that the United Mineworkers of America were not suable in the name of the association was waived." *United Mine Workers of America* v. *Cromer*, 159 Ky. 605, 167 S. W. 891, 892 (1914).

To recapitulate: Petitioners concede that no special demurrer would lie to the libel as filed. Since a special demurrer can be sustained only when the defect complained of appears on the face of the pleading, the introduction

into the record of the affidavit for leave to sue *in forma pauperis* did not make such demurrers proper. The affidavit did not indicate respondent's incapacity, but even if it had so indicated, special demurrers did not lie. Had they been proper, they would have been waived by the prior filing of petitioners' general denials. Petitioners never sought to amend their answers to incorporate therein a plea in abatement under section 118 (which plea was the only proper remedy open to them to assail the alleged defect), and they accordingly waive their right to object. This being true, petitioners' discussion concerning their pleading to the amended libel is irrelevant. Likewise irrelevant is the *Jewel Tea* case, again recounted at length by petitioners. In respondent's original brief (pp. 12, 13), as well as in oral argument, differences between that case and the one at bar were indicated. So far as the waiver question is concerned, it is sufficient to state that the court in the *Jewel Tea* case decided only that an administrator who admitted that his appointment was "void" and that the allegations in this petition with regard to his appointment were false, and who made no claim to authority to act under a de facto status, could not prevail simply because the defendant did not deny the false allegations in its answer. Neither the *Ebner* case, nor any other case cited in this brief, was discussed because the issue before the court was different from the questions raised in those cases and in this case.

Not only does it appear that, under Kentucky law, petitioners waived their right to object to the alleged defect in respondent's Kenton County appointment, but it is also evident that, irrespective of such waiver, the *filing of respondent's original libel tolled the statute of limitations* under the Kentucky law. In *Salyer v. Consolidation Coal Co.*, 246 Fed. 794 (C.A. 6, 1918), cert. den. 246 U. S. 669

(1918), the Kentucky cases applicable to a situation similar to that which petitioners claim to exist in the case at bar were carefully analyzed and construed in a suit for wrongful death brought by decedent's mother as administratrix in a Kentucky court and removed to a federal court. Plaintiff was a married woman and as such, under a Kentucky statute, was ineligible to be an administratrix. After the period of limitations had expired this defense was urged, and the administratrix resigned. A successor administrator was appointed who, together with the mother, asked that he be permitted to continue the action. The trial court ruled that the original appointment was void, that there was nothing to amend, that limitations barred any action equivalent to a new proceeding, and dismissed the suit.

On appeal, the Court of Appeals for the Sixth Circuit assumed that the *Fentzka* case (relied upon in the *Vassill* case) determined that a suit brought by an administrator under a void appointment is no suit at all and that the federal courts are bound by such decision as the law of the state. After making these assumptions, the court said that the question still remained: "Was the appointment of the plaintiff as administrator void, or did it give her at least color of title to the office?" The court added (p. 796):

> "This question has not been expressly decided in Kentucky, but a review of the decisions in the state indicates to us quite clearly what must be considered the Kentucky rule. In such an examination, we must bear in mind that the word 'void' is often loosely used, and perhaps no court is exempt from just criticism in this particular; and it follows that, in cases where the precise distinction between 'void' and 'voidable' is not controlling, the use of the broader word does not end inquiry as to the force of the distinction."

After a meticulous review of the Kentucky cases and statutes the court said (p. 799):

"Our conclusions are—and we need go no further—that under the Kentucky statutes, Mrs. Salyer's appointment ought to be deemed of enough force and effect so that an action begun by her saved the case from the statute of limitations, and that we find no settled rule in Kentucky constraining us to the contrary result.

"Another Kentucky statute confirms this conclusion, although this other statute has not been thought applicable—or, at least, has not received attention—in cases under section 3905. It is section 3848, given in the margin. It is discussed in McFarland's Adm'r. v. Railroad, supra, and clearly makes valid and effectual the beginning of this suit by Mrs. Salyer, if her appointment can be considered as not utterly void."

Section 3848, referred to by the court, is the present section 395.330 of Kentucky Revised Statutes, hereinabove quoted.

The court concluded that since the original plaintiff's appointment was, under Kentucky law, of sufficient effect so that her suit avoided the bar of limitations, the successor administrator could be substituted as plaintiff by amendment under the rule of *Missouri, Kansas and Texas Ry. Co.* v. *Wulf*, 226 U. S. 570 (1913).

The *Salyer* case correctly expounds the Kentucky law. If respondent's first appointment was irregular at all, which is denied, the defect was purely formal, and the appointment was not "void." As the Court of Appeals remarked in its opinion in the case at bar, in such cases "essential justice requires that liberal amendment be permitted."

The foregoing emphasizes the argument made in respondent's original brief and at bar to the effect that:

1. There is nothing in the record to show any irregularity in the original appointment. The mere fact that a year after the appointment the assets were alleged by the

affidavit to be then insufficient or not of the character required as security for costs does not show or prove that there were not sufficient assets to support the appointment of an administrator a year earlier.

2. The appointment was sufficient to qualify the administrator and to enable him to act and to commence an action against the wrongdoers. He acted under color of title and right until his appointment was set aside or otherwise questioned. Such an act was sufficient to bring the real parties in interest, to wit, the dependents and next of kin of the deceased, and the defendants into court and thereby tolled the statute of limitations.

3. The subsequent appointment in an adjoining county of the same administrator, for the same next of kin, in the same estate, is valid and is not questioned. An amendment to this effect in no way changes the cause of action. It does not prejudice anyone and is a mere matter of formal procedure—which respondent contends is proper under both Kentucky law and federal law.

4. Even if the procedure or pleading in Kentucky is differently construed, an amendment of a formal and nominal party is permitted under the decisions of this court, the uniform decisions of the federal courts, and under both the Rules of Civil Procedure and the Admiralty Rules applicable to this case.

5. Respondent submits that this is not the kind of case which should occasion a change in the long accepted and determined law applicable to amendments in admiralty. To deny the right to amend in this case would deny the dependents of the girl who was killed even a day in court and would allow the men adjudged responsible for her death to go Scot free for no reason grounded in substance. Respondent urges that the law of the case was properly made when the Court of Appeals entered its original opinion

and judgment and this court denied certiorari. Respondent does not believe that any change in the law or Admiralty Rules should be made, but, if made, it is submitted such change should be applied prospectively and not retroactively.

Respectfully submitted,

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